Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1640

NATIONAL DYNAMICS CORPORATION, a corporation, and ELLIOTT MEYER, individually and as an officer of said corporation,

Petitioners,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1975

No. .....

NATIONAL DYNAMICS CORPORATION, a corporation, and ELLIOTT MEYER, individually and as an officer of said corporation,

Petitioners,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on February 10, 1976, which affirmed paragraphs I and II of a Reformulated Order of the Federal Trade Commission (the "Commission"), dated June 17, 1975, commanding Petitioners to cease and desist from certain alleged deceptive practices found by the Commission to violate Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1) (the "Act").

Citations to Opinions Below

The order of the Court of Appeals for the Second Circuit is printed in the Appendix hereto, and is not officially reported.

The opinion and order of the Federal Trade Commission is printed in the Appendix hereto and is officially reported at —— FTC —— (1975).

The opinion of the Court of Appeals remanding the Commission's original order is printed in the Appendix hereto and is officially reported at 492 F.2d 1332 (1974).

Jurisdiction

The judgment of the Court of Appeals was entered on February 10, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Did the Court of Appeals err in affirming an Order of the Commission which is arbitrary, capricious and an abuse of discretion, and which deprives Petitioners of their right to "due process" under the Fifth Amendment to the Constitution of the United States?

2. Did the Court of Appeals err in affirming an Order of the Commission which deprives Petitioners of their rights under the First Amendment to the Constitution of the United States?

3. Did the Court of Appeals err in affirming an Order of the Commission which fails to comply with the Court's prior opinion on remand?

Statutes Involved

The statutory provision involved is Section 5(a)(1), of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), and the First and Fifth Amendments to the Constitution of the United States. The statute and constitutional amendments are printed in the Appendix hereto.

Statement

This is a petition for Writ of Certiorari to review an Order and Judgment of the United States Court of Appeals for the Second Circuit, entered on February 10, 1976, which affirmed a reformulated Order of the Federal Trade Commission commanding Petitioners to cease and desist from certain alleged deceptive practices allegedly found by the Commission in this case to violate 15 U.S.C. 45(a)(1). It is paragraphs I and II of said Order which Petitioners wish this Court to review as in violation of their constitutional right under the First and Fifth Amendments to the Constitution of the United States, beyond the scope of Section 5 of the Act, and not in compliance with the directions given by the Court of Appeals on remand.

Facts

Petitioner National Dynamics Corporation is a corporation organized and existing under the laws of the State of Florida, with its office and principal place of business at 145 East 32nd Street, in the City, County and State of New York. The corporation markets, exclusively through mail order, a battery additive called VX-6. It was stipulated between counsel that in 1969, respondents sold VX-6 to 12,000 individuals who bought for resale, and 6,000 individuals who purchased as consumers.

Petitioner Elliott Meyer is an individual, and an officer and director, of the corporate petitioner. He formulates, directs and controls the acts and practices thereof. (Throughout most of this brief, the petitioners will be referred to collectively as "Petitioners.")

On November 21, 1969, the Commission issued a Complaint and Order alleging that petitioners were engaged in unfair methods of competition and deceptive acts and practices in violation of Section 5 of the Act (15 U.S.C. 45(a)(1)).

So far as material to this petition, the Complaint alleged that petitioners, through the publication of certain advertising, falsely represented to the public, among other things, that Petitioners' agents and distributors were regularly earning $1,554 per week, $25,000 per year and other high amounts, whereas in truth and in fact, distributors do not realize such earnings and, on the contrary, few if any attain such earnings.

Three pre-trial hearings were held in Washington, D.C. and evidentiary hearings were held in New York City. Seventeen witnesses testified, almost 400 documents were admitted into evidence, including approximately 7 laboratory tests of VX-6, and over 4,800 pages of testimony taken. The Administrative Judge, the Honorable Donald R. Moore, made findings of facts and conclusions of law and entered an order, dated May 24, 1971, dismissing most of the Complaint.

Briefly, as relates to the instant petition, the Judge's Order prohibited past earnings claims of specific distributors of VX-6 unless such claims represented earnings of a substantial number of agents.

The Commission's Order of February 16, 1973 followed, and Petitioner's appeal from that Order resulted in the United States Court of Appeals for the Second Circuit remanding for reformulation of paragraphs 1 and 2 in an opinion dated March 6, 1974 (appearing at 492 F.2d 1332 (1974)) and reprinted for the convenience of the Court in the accompanying Appendix at p. 16a.

Following remand, the Commission reopened the proceeding by order, dated October 8, 1974. Counsel supporting the complaint submitted its proposed reformulation on November 18, 1974. National Dynamics submitted its proposed reformulation on November 19, 1974. Counsel supporting the complaint replied to the reformulation proposed by National Dynamics on December 4, 1974, and National Dynamics replied to Complaint counsel's proposal on December 9, 1974.

On March 4, 1975, the Commission entered a final order on remand.

On April 12, 1974, counsel supporting the complaint moved for reconsideration of the Commission's "final order" and on May 14, 1975, National Dynamics filed its opposition to the motion.

On May 27, 1975, the Commission stayed the effective date of its order of March 4, 1975, and on June 17, 1975, it issued the Order which petitioner herein seeks reviewed (12a).

REASONS FOR GRANTING THE WRIT

1. Paragraph I:

a. *Arbitrary and Capricious.*

Paragraph I raises several important issues. First, the Order in paragraph I(A) is arbitrary and capricious because, by its inclusion of the word "can", it unreasonably prohibits Petitioners from making advertising claims which have a reasonable basis in fact, and which others in similar situations have been permitted to make. The use of the word "can" prevents petitioners from representing potential earnings of distributors. This restriction is beyond the authority of the Commission and exceeds the opinion of the Second Circuit Court of Appeals, which remanded with the suggestion that the Commission base the reformulated Order on a similar Order in *Matter of Merlite Industries, Inc.,* File No. 6523049, dated March 1, 1967.

The Commission, contrary to the suggestion of the Court, went far beyond the order in *Merlite.* The *Merlite* Order permitted representations in advertising of potential earnings if they had a reasonable basis in fact, and as long as any general statements made with respect to potential earnings were accompanied by "the pertinent facts with reference to such earnings." In the instant case, however, the Commission has prohibited such representations, whether or not there is a reasonable basis in fact.

The arbitrariness and capriciousness of the Order is further illustrated by the fact that in the *Matter of Federated Sanitary Corp., et al.,* File No. 7023176, signed August 2, 1974, the Commission accepted another Consent Order which also allowed similar representations to be made. *Federated Sanitary* involved a situation very similar to the one at bar, and the Commission there accepted an order which permitted representations of potential earnings as long as "the pertinent facts with reference to such earnings" were disclosed. Again, this is in direct opposition to the order in the case at bar, and contrary to the suggestion of the Second Circuit on remand, which would have permitted such representations to be made based on the mark-up permitted to distributors (see point 2, *infra*). There is no reason to treat Petitioners differently than the petitioners in *Merlite* and *Federated Sanitary,* and to do so is arbitrary, capricious and an abuse of discretion, and deprives Petitioners of their right to "due process" under the Fifth Amendment.

b. *Unconstitutional Prior Restraint.*

Paragraph I(B), with certain enumerated exceptions, prohibits petitioners from making truthful, non-deceptive representations. There is no justification for this in law, and it constitutes an unconstitutional prior restraint of Petitioners' freedom of speech.

The question of first amendment rights in advertising arose most recently in *Bigelow* v. *Virginia,* 421 U.S. 809,

95 S. Ct. 2222 (1975). There, the State had taken the position that paid commercial advertisements were not entitled to the protection of the First Amendment. This Court reached a contrary conclusion, holding that speech is not stripped of First Amendment protection "merely because" it appears in the form of a paid commercial advertisement.

The Court said that even when published materials involve sales or solicitations or someone was paid for printing it, or the motive for printing involved financial gain, "the State was not free of constitutional restraint . . . " The Court went on to state: "The existence of 'commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment'. *Ginzburg* v. *United States,* 383 U.S. 463, 474 (1966)." 95 S. Ct. at 2231.

In *Federated Nationwide Wholesalers* v. *FTC,* 398 F.2d 253 (2nd Cir. 1968), which involved a situation closely analogous to the one at bar, the Commission issued an Order which prohibited the petitioners from representing that they were "wholesalers". The Order contained a proviso which would have permitted the petitioners to prove the truth of their representations as a defense in any enforcement proceeding brought by the Commission. The Court there vacated the Order, holding that, "Providing some alleviation from the rigors of an Order, unjustifiably barring the petitioners from the use in a sizable part of their business of the word 'wholesale' and its derivatives, does not cure the error." 398 F.2d at 259.

Even the fact that Petitioners may have committed past violations of the Act, does not justify so burdensome a restriction. The Court in *Federated* went on to say, at

260, that although the Commission has broad discretion in fashioning orders dealing with unfair trade practices, that discretion " . . . is not absolute and does not immunize from review an Order such as this one which sweeps across lawful and unlawful behavior without distinction."

It is not illegal *per se to* make representations as to potential earnings. What makes it illegal, and subject to a prohibitory Commission Order, is the false and deceptive use of such representations. The Act invests the Commission with authority only to enjoin unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce; and any order which enjoins *per se* a nondeceptive act is beyond the Commission's statutory authority. Petitioners submit, therefore, that the order in question here should be vacated because it "sweeps across lawful and unlawful behavior without distinction," and exceeds the authority of the Commission.

Petitioners are not asking for the right to make claims which are false or deceptive, they are merely requesting their freedom from any prior restraints on their advertising, which freedom is guaranteed to them by the First Amendment. There is no legitimate interest being served by denying Petitioners this constitutional right.

2. Paragraph II fails to comply with the opinion of the Court of Appeals remanding the Commission's Order.

On remand, the Court of Appeals directed the Commission to clarify Paragraph II of the February 14, 1974 order by having Petitioners substantiate their earnings claims with records which showed "the sales to each distributor and information concerning the permitted mark-up", as long as "the representations were similarly limited" (18a). The Commission failed to comply, thereby

invalidating Paragraph II. Perhaps this direction was ignored because the Commission realized that if such language had been included in Paragraph II, it would have contradicted Paragraph I, which calls for representations of what was "actually achieved", further pointing up the fact that it, too, failed to comply with the opinion of the Court of Appeals on remand. (See point 1a, *supra.*)

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and paragraphs I and II of the Commission Order dated June 17, 1975 should be set aside.

Respectfully submitted,

SOLOMON H. FRIEND
c/o JEROLD W. DORFMAN
Counsel for Petitioners

ROBERT A. SCHWARTZ
Of Counsel

APPENDICES

Order and Judgment of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of February, one thousand nine hundred and seventy-six.

Present:

HON. J. EDWARD LUMBARD,
HON. WILLIAM H. TIMBERS,
Circuit Judges,
HON. FREDERICK vP. BRYAN,
District Judge.

75-4179

NATIONAL DYNAMICS CORPORATION, a corporation, and ELLIOT MEYER, individually and as an officer of said corporation,

Petitioners,

—v.—

FEDERAL TRADE COMMISSION,

Respondent.

A petition for review of an order of the Federal Trade Commission.

This cause came on to be heard on a certified list of items comprising the record of the Federal Trade Commission and was taken on submission.

Upon consideration thereof, it is now hereby ORDERED, ADJUDGED AND DECREED that the petition for review be and it hereby is denied and that the order of said Federal Trade Commission be and it hereby is enforced with costs to be taxed against the petitioners.

A. DANIEL FUSARO
Clerk

by VINCENT A. CARLIN
Chief Deputy Clerk

OPINION OF THE COMMISSION.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Lewis A. Engman, Chairman
Paul Rand Dixon
Mayo J. Thompson
M. Elizabeth Hanford
Stephen Nye

In the Matter of	)	
NATIONAL DYNAMICS CORPORATION, a corporation, and	)	DOCKET NO. 8803
ELLIOTT MEYER, individually and as an officer of said corporation	)	

OPINION OF THE COMMISSION

By Dixon, Commissioner:

Complaint counsel have filed a "Petition for Reconsideration" of the Commission's Order in this matter issued on March 4, 1975. Respondents have replied in opposition. In order to obtain more time within which to consider the petition for reconsideration, the Commission, by order dated May 27, 1975, stayed the effective date of its March 4 order, and thereby, the time within which respondents might appeal it. The order of March 4 modified an earlier cease and desist order of the Commission, pursuant to remand from the United States Court of Appeals for the Second Circuit, which had instructed that the original order be changed.

Having reviewed the arguments made by complaint counsel in their petition for reconsideration, and respondents' arguments in opposition, and after conducting our own review of the order previously entered, we have determined that it must be modified in order to accomplish the purposes intended by the Commission when it issued its opinion and order of March 4. The order as revised is designed to eliminate certain "loopholes" in the earlier order to which complaint counsel have properly objected, while setting forth in some

detail and with greater clarity a wide variety of options available to respondents for making truthful claims concerning the earnings of their distributors, consistent with the mandate of the Court of Appeals.

The Commission's original order in this matter, of which the Court of Appeals disapproved, limited respondents essentially to representations of average earnings. The Court of Appeals remanded with the instructions that respondents should not be limited to average earnings. The Court suggested that the Commission consider permitting ranges of earnings to be represented, and implied, by its reference to an earlier assurance of voluntary compliance, that truthful testimonials should also be allowed, though cautioning that respondents must not be allowed to make deceptive use of the unusual earnings of a few.

In fashioning our modified order, we have proceeded on the theory that respondents should be allowed to make a wide variety of simple, truthful, nondeceptive statements concerning the earnings of their distributors. At the same time, they must be prevented from bandying about high earnings achieved by a minority of purchasers with no indication of the unrepresentativeness of such earnings. If respondents lack evidence that the high reported earnings of a few distributors are in fact representative of the earnings of large numbers of other distributors, then it is clearly deceptive for them to portray the minority results reported to them without a clear indication of their unrepresentativeness. The appended order embodies a general prohibition on representations of past earnings, followed by a detailed enumeration of various broad sorts of earnings claims, in addition to average earnings claims which respondents may make:

(1) Average or median earnings. The order makes clear that any true statement of average or median earnings achieved by distributors during any particular stated past time period is permissible. For example;

1. "Last year our distributors earned an average of $_____."

2. "In 1971 our distributors earned an average of $_____."

3. "For all of 1973 our distributors earned an average of $_____ per month."

4. "In May, 1973, our distributors earned an average of $_____."

The requirement that respondents provide some indication of the time period upon which a statement of earnings is based is implicit in the requirement that they not misrepresent past earnings, a prohibition sanctioned by the Court of Appeals. Failure to disclose that represented achievements are in fact several years old is clearly misleading, since the assumption of readers is likely to be that they are based on recent information.

(2, Statement of non-average, non-median earnings achieved by a substantial number of purchasers. Respondents may wish to advertise that some number of their purchasers have earned some stated figure or more when the stated figure exceeds the average. The order would permit all representations of this sort, provided that a substantial number of purchasers have in fact earned the stated figure or more, and provided that a clear and conspicuous disclosure is made of the percentage of the total number of distributors constituted by those who, according to respondents' representations, have achieved or exceeded the stated amount. The percentage disclosure is necessary in order to avoid the misleading implications of statements such as "Hundreds of our distributors have earned $_____ or more" when the hundreds constitute only a tiny fraction of all purchasers. Examples of the numerous earnings claims permitted by this section would be the following:

1. "Last year at least 585 of our distributors (___% of all our distributors) earned $_____ or more."

2. "In 1972, ___% of our distributors earned $_____ or more."

3. "In all of 1973, hundreds of our distributors (___% of all distributors) earned an average of $_____ or more per month."

4. "In May, 1973, at least 600 of our distributors (___% of the total) earned $_____ or more."

(3) Statements of earnings ranges. As complaint counsel have pointed out in their petition for reconsideration, statements of ranges may be deceptive if the earnings

ranges are too large. A consumer presented with a statement that thousands of distributors have earned from "$_____ to $_____" is likely to assume that the average lies somewhere near the middle of the range, and that substantial numbers of people have achieved results in the top of the range. As complaint counsel point out in their petition for reconsideration, stipulated records in this case show for a particular year that over 99% of respondents' distributors earned under $10,000, while a few earned in excess of $25,000. Common sense, moreover, would suggest that in most business opportunity situations one would find a few exceptional individuals performing well above average, rather than an even distribution of earnings results from bottom to top. Thus, the use of an unduly large range which encompasses the exceptional earnings of a few will result in deception, with the extent of deception increasing as the range does.

Complaint counsel's solution to this problem is to require that respondents state figures for each quartile of any earnings range they choose to employ. This solution, however, would not be fair in instances where respondents properly employed narrow ranges in an effort to present an accurate portrayal of their purchasers' earnings, nor would it entirely suffice in instances where respondents chose ranges so large that even quartiles thereof might be unduly broad. We think it is clear that in suggesting that the Commission fashion its order to permit the use of earnings ranges, the Court of Appeals anticipated that respondents would make use of reasonably descriptive ranges. In dealing with this problem in the past the Commission has at times adopted the approach of mandating particular ranges within which disclosures must be made. 1/ In an effort to allow respondents maximum flexibility consistent with the nondeceptive use of earnings ranges, we believe the most appropriate solution in this case is to set an outer limit on the size of permissible ranges.

The order as revised will limit the size of permissible ranges to $4,000 for representations of yearly earnings and proportional amounts for other time periods. Stipulated evidence in this case indicated that for a recent year over 99% of respondents' distributors earned $10,000 or less. Thus, if respondents wish to use earnings ranges to give consumers an accurate picture of the earnings achieved by their distributors, it appears they will be able to cover the earnings of over 99% of their distributors by use of at

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1/ See Universal Credit Acceptance Corp., et al., 82 FTC 570, 670 (1973), reversed as to another issue, sub nom Heater v. Federal Trade Commission, __F. 2d ___ (9th Cir. 1974).

most three ranges. Even allowing for some measure of inflation and improvement in the performance of respondents' distributors, it would appear that at most four or five $4,000 ranges will, for the foreseeable future, be adequate to permit a description of the earnings of all but a tiny, unrepresentative handful of purchasers. 2/ Larger ranges, in light of these considerations, could too easily be used to deceive. In the event that circumstances should change in the future and respondents can demonstrate that the order as drafted would prevent them from describing the earnings of the vast majority of their distributors by means of a small number of ranges, they may petition the Commission to modify its order.

In addition, the order as revised requires that in stating any range, respondents must indicate the percentage of their distributors who have achieved results within the range. As noted with respect to statements of non-average earnings above, this requirement is necessary to avoid the misleading implications of such statements as "Hundreds of our distributors have earned from $_____ to $_____" when in fact the hundreds may constitute only a small fraction of the total. In the event, however, that respondents choose to employ ranges beginning with $0 and proceeding continuously upward, they need only indicate the number or percentage of distributors within each range. Under such circumstances a consumer can readily determine the significance of large absolute numbers in the higher ranges.

As in the case of other provisions, the one respecting earnings ranges requires that they must apply to "any stated period of time." Once again, this phrase is intended to require that respondents indicate the year in which stated results were compiled, as well as whether the results are yearly results, monthly averages, the results of one month only, or whatever. We think this is clearly implied in any requirement that respondents not misrepresent earnings. Pursuant to subsection (3) of the order, following are examples of the many sorts of representations which respondents would be able to make:

1. "In 1973, (number) of our distributors (___% of all our distributors) earned from $6-10,000."

2/ Respondents can, of course, encompass the earnings of all those at the top with a representation in the form "$_____ or more," permitted by the order, or by use of testimonials, infra.

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2. "In April, 1972, ___% of our distributors earned from $350-700."

3. "In the first 9 months of 1973, (number) of our distributors (___% of the total) earned from $400-750 each month."

4. "In 1972, our distributors achieved the following earnings:

$0-4,000	(number or percentage)
$4-8,000	" "
$8-12,000	" "
$12,000 and up	" "

(4) Earnings testimonials. Complaint counsel are correct, we believe, in pointing out that even though a consumer may be apprised that an earnings testimonial represents a "better than average" result, the consumer is still likely to assume that testimonial results represent an achievement that is within the realm of reasonable possibility for herself or himself. Thus, if a truthful testimonial represents a performance that has been achieved by only one or a handful of purchasers out of thousands, it is likely to convey a misleading impression even in the presence of a disclosure that it is a "better than average" result. For this reason, we believe it necessary to alter the treatment given to this problem in our order of March 4. One possible solution would be simply to prohibit the use of testimonials which describe a performance which has not been matched or exceeded by a representative fraction of respondents' purchasers. An alternative would be to require a disclosure which adequately apprises the consumer of the full extent of the disparity between the testimonial performance and the performance of others. Under the circumstances of this case we believe an appropriate resolution is to permit all truthful testimonials, provided the following disclosures are made:

1. A statement of the average amount of time per day, week or month spent by the purchaser to achieve the stated performance;

2. The year or years during which, and the geographical area in which the results were achieved;

3. If the results achieved by the purchaser have been accomplished or exceeded by fewer than 10% of its distributors, either of the following disclosures, in conspicuous boldface type:

   (a) a statement of the average or median achieved by all distributors; or

   (b) the following statement in boldface type:

   IMPORTANT NOTICE: THE RESULTS DESCRIBED ABOVE ARE SUBSTANTIALLY IN EXCESS OF THE AVERAGE RESULTS ACHIEVED BY ALL OUR DISTRIBUTORS. OUR RECORDS SHOW THAT ONLY ___% OF OUR DISTRIBUTORS HAVE EQUALLED OR EXCEEDED THE PERFORMANCE DESCRIBED ABOVE DURING THE INDICATED TIME PERIOD.

4. If respondents have records to indicate that the results achieved by a purchaser have been matched or exceeded by more than 10% of its distributors, either of the following disclosures:

   (a) a statement of the average or median achieved by all distributors; or

   (b) a statement of the percentage of respondents' distributors who have equalled or exceeded the performance indicated during the indicated time period.

If the results achieved by the purchaser are in fact those of only an unrepresentative fraction (we have chosen 10% for the sake of clarity and precision) of total purchasers, then we believe it is imperative that consumers be placed on notice in the strongest terms of the unrepresentativeness of the stated performance. A disclosure of average earnings should be sufficient to notify viewers of the full extent of the disparity. If respondents do not wish to compile average figures, then they must make a disclosure which warns in the strongest possible terms of the

unrepresentativeness of the purchaser. The alternative disclosure provided would not require any additional record-keeping on respondents' part, since it requires only a disclosure of the fraction of purchasers who, according to whatever records respondents have chosen to keep, have equalled or exceeded testimonial performance.

On the other hand, if, in fact, the testimonial performance has been equalled or exceeded by a significant fraction of all purchasers then a simple indication that it exceeds the average should be sufficient to convey an accurate impression. This can be accomplished by an actual statement of the average, or a statement of the actual fraction of purchasers who, to respondents' knowledge, have equalled or exceeded the represented performance. Examples of the numerous simple, concise, nondeceptive testimonials which would be permitted by this order are as follows:

1. "In 1973, Mary Roe earned $_____ selling VX-6 battery additive in the New York Metropolitan area, spending an average of ___ hours per week on the job. The average earnings for all our purchasers during the same period were $_____."

2. "In 1972, John Doe earned $_____ selling VX-6 battery additive in the Philadelphia Metropolitan area, spending an average of ___ hours per week on the job. 15% of all our distributors did as well as or better than John that year."

Paragraph 2 of the order has been modified to require maintenance of substantiation for claims made pursuant to paragraph 1. We have not republished paragraphs 3 through 6 of the original order because those paragraphs have previously become final.

As modified, we believe the order entered herein will permit respondents to make a virtually limitless variety of simple, truthful, nondeceptive statements concerning the earnings of their distributors, while at the same time preventing them from passing off the earnings of unrepresentative samples with no disclosure of their unrepresentativeness. If respondents have evidence that impressive

fractions of their distributors have earned goodly sums of money, they should be pleased to disclose the facts. On the other hand, if they lack evidence that more than a small fraction of distributors have earned given amounts, it would be a disservice to consumers to permit the representation of such amounts in advertisements without information to place them in perspective. While absolute clarity and precision in an area of such complexity as that of earnings claims is certainly impossible, we believe the approach adopted herein is in accord with the mandate of the Court of Appeals on remand and sufficient to eliminate the shortcomings of the Commission's order of March 4, 1975.

Because the Commission has modified its earlier order, respondents will, by law, have the full statutory time period within which to appeal the new order. Their request for a 30-day period within which to appeal following our disposition of the motion to reconsider is, therefore, moot.

By the Commission.

June 17, 1975

ORDER GRANTING IN PART PETITION FOR RECONSIDERATION AND MODIFYING ORDER TO CEASE AND DESIST.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Lewis A. Engman, Chairman
Paul Rand Dixon
Mayo J. Thompson
M. Elizabeth Hanford
Stephen Nye

In the Matter of	)	DOCKET NO. 8803
NATIONAL DYNAMICS CORPORATION, a corporation, and ELLIOTT MEYER, individually and as an officer of said corporation	)	ORDER GRANTING IN PART PETITION FOR RECONSIDERATION AND MODIFYING ORDER TO CEASE AND DESIST

Complaint counsel have filed a "Petition for Reconsideration" of the Commission's order in this matter issued on March 4, 1975. Respondents have replied in opposition. The Commission has determined upon review of the matter that paragraphs 1 and 2 of its order of March 4, 1975, must be modified, for reasons indicated in the accompanying opinion. Therefore,

IT IS ORDERED that respondents National Dynamics Corporation, a corporation, and its officers, and Elliott Meyer, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, or distribution of the battery additive VX-6, or of any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(I) (A) Representing, directly or by implication, that persons purchasing respondents' products can or will derive any stated amount of sales, profits, or earnings therefrom;

(b) Misrepresenting in any manner the past, present, or future sales, profits or earnings from the resale of respondents' products,

ORDER GRANTING IN PART PETITION FOR RECONSIDERATION AND MODIFYING ORDER TO CEASE AND DESIST

or representing, directly or by implication, the past or present sales, profits or earnings of purchasers of respondents' products except that any or all of the following representations shall not be prohibited:

(1) A true statement of the average or median sales, profits, or earnings actually achieved by all purchasers of respondents' products during any stated time period.

(2) A true statement of any particular amount of sales, profits, or earnings actually achieved or exceeded by a substantial number of purchasers of respondents' products during any stated time period, provided that it is accompanied by a clear and conspicuous disclosure (if printed, in typesize at least equal to that of the statement of sales, profits, or earnings) of the percentage of the total number of purchasers who have achieved such results.

(3) An accurate representation of any range or ranges of sales, profits, or earnings actually achieved by purchasers of respondents' products for any stated period of time. Ranges describing yearly results shall not exceed $4,000 (e.g., $0-4,000; $2,000-6,000; $4,000-8,000). Ranges describing monthly results shall not exceed $350 (e.g., $0-350; $350-700) and ranges describing results for any other time period shall not exceed an amount constituting the same percentage of $4,000 as the time period constitutes of one year. A representation of any range or ranges of sales, profits, or earnings achieved by purchasers of respondents' products must include a clear and conspicuous statement (if printed, in typesize at least equal to that of the statement of the range) of the percentage which purchasers achieving results within the range constitute of the entire number of respondents' purchasers, provided, however, that if the ranges employed begin with $0 and proceed continuously upward, a statement of the number of purchasers within each range may be included in lieu of the percentage.

(4) Truthful testimonials regarding the sales, profits, or earnings achieved by a purchaser of respondents' products, provided that any such testimonial includes or is accompanied by the following clear and conspicuous disclosures (if printed, in boldface type at least equal in size to that of any sales, profits, or earnings figure stated in the testimonial):

(i) An accurate statement of the average amount of time per day, week, or month required by the purchaser to achieve the stated results;

(ii) An accurate statement of the year or years during which, and the geographical area(s) in which, the stated results were achieved;

(iii) If the results achieved by the purchaser providing the testimonial have not been achieved by at least 10% of all purchasers of respondents' products during the time period covered by the testimonial, a statement of the average or median sales (or profits or earnings, whichever is included in the testimonial) of all purchasers of respondents' products during the time period covered by the testimonial, or the following statement:

IMPORTANT NOTICE: THE RESULTS DESCRIBED ABOVE ARE SUBSTANTIALLY IN EXCESS OF THE AVERAGE RESULTS ACHIEVED BY ALL OUR DISTRIBUTORS. OUR RECORDS SHOW THAT ONLY___% OF OUR DISTRIBUTORS HAVE EQUALLED OR EXCEEDED THE PERFORMANCE DESCRIBED ABOVE DURING THE INDICATED TIME PERIOD; and

(iv) If the results achieved by the purchaser providing the testimonial have been achieved by 10% or more of all purchasers of respondents' products during the time period covered by the testimonial, but are in excess of the average or median

results achieved by all purchasers, a statement of the percentage of all respondents' distributors who, according to respondents' records, have achieved equal or better results during the same time period, or a statement of the average or median results achieved by all purchasers of respondents' products during the same time period.

(II) Failing to maintain records which substantiate that any representation made regarding past or present sales, profits, or earnings are accurate. Such records shall be sufficient to substantiate the accuracy of any representations made regarding amounts earned or sold, the number or percentage of purchasers achieving such results, the time period during which such results are achieved, and the amount of time per day, week, or month required to achieve such results.

IT IS FURTHER ORDERED that the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

IT IS FURTHER ORDERED that respondents shall notify the Commission at least 30 days prior to any proposed change in the corporate respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

S E A L

Chas. A. Tobin
Charles A. Tobin
Secretary

ISSUED: June 17, 1975

NATIONAL DYNAMICS CORPORATION, a corporation, and Elliott Meyer, Individually and as an officer of said corporation, Petitioners,

v.

FEDERAL TRADE COMMISSION, Respondent.

No. 355, Docket 73-1754.

United States Court of Appeals, Second Circuit.

Argued Jan. 16, 1974.

Decided March 6, 1974.

Jerold W. Dorfman, New York City (Friend & Dorfman, New York City, of counsel), for petitioners.

John T. Fischbach, Federal Trade Commission, Washington, D. C. (Calvin J. Collier, Gen. Counsel, and Harold D. Rhynedance, Jr., Asst. Gen. Counsel, Federal Trade Commission, Washington, D. C., of counsel), for respondent.

Before MOORE, FRIENDLY and ANDERSON, Circuit Judges.

PER CURIAM:

National Dynamics Corporation (NDC) manufactures a battery additive known as VX-6. It markets the product largely through some 12,000 distributors. Some of these work on a full-time

basis, but most work only part-time. The distributors are not NDC employees, but the company supplies them with sales and advertising materials with which to promote the product.

In November 1969, the Federal Trade Commission issued a complaint against NDC's advertising practices. Broadly speaking, the charges were of two sorts: some related to allegedly misleading claims concerning potential earnings of VX-6 distributors; others concerned the performance claims NDC made for its product. Following the leisurely course typical of FTC proceedings, this one led to a six paragraph cease and desist order issued February 16, 1973, and ended in an order denying reconsideration dated May 1, 1973.

Only four of the six ordering paragraphs are challenged. Two of these, paragraphs 1 and 2, relate to the overly enthusiastic depiction of the rewards awaiting prospective distributors; one, paragraph 4, relates to representations concerning the performance of VX-6; the remaining one, paragraph 6, directs NDC to deliver a copy of the order to all present salesmen or other persons engaged in the sale of its products and to secure a signed statement acknowledging receipt.

[1] Paragraph 1 requires NDC to cease and desist from

> Representing, directly or by implication, that persons purchasing respondents' products can or will derive any stated amount of sales, profits or earnings; or representing, directly or by implication, the past or present sales, profits or earnings of purchasers of respondents' products unless in fact the past sales, or the profits and earnings represented, are those of a substantial number of purchasers and accurately reflect the average sales, profits or earnings of such purchasers under circumstances similar to those of the purchaser or prospective purchaser to whom the representation is made; or misrepresenting, in any manner, the past, present or future sales, profits or earnings from the resale of respondents' products.

In the course of its attack on this paragraph, NDC says it cannot feasibly comply with the phrase "under circumstances similar to those of the purchaser or prospective purchaser to whom the representation is made" since it does not know what the circumstances of any particular purchaser may be. Apparently the Commission was endeavoring to require NDC to disclose whether the distributors whose earnings they cited worked part-time or full-time, but the language is not well adapted to carrying out this sound purpose. We likewise do not see why NDC should be limited to advertising only the average sales or earnings of its distributors rather than be permitted to state ranges for various types of distributors, provided it does not make deceptive use of unusual earnings realized only by a few. We shall not undertake to redraft the paragraph; with some good will on both sides, these problems should be readily susceptible of resolution.[1]

[2, 3] Changes in paragraph 1 will require conforming changes in paragraph 2 which requires NDC to maintain records substantiating the accuracy of its representations. Beyond that, while the Commission can permissibly require NDC to keep records of the sales of distributors in various basic categories, such as part-time and full-time workers, the requirement that the records reflect the sales, profits or earnings of distributors "under circumstances similar to" purchasers or prospective purchasers is too vague. NDC also objects to the recordkeeping requirement because it claims that it cannot feasibly obtain the profit and earn-

1 NDC has called our attention to the action of the FTC in approving an affidavit of compliance on a similar issue in Matter of Merlite Industries, Inc., File No. 6523049, dated March 1, 1967. Without in any way limiting the FTC to that formulation, we think it may afford a useful basis from which to start a redraft.

ings figures of its thousands of distributors. Commission counsel answers that NDC must have records showing the sales to each distributor and information concerning the permitted markup, and that this would suffice if the representations were similarly limited. We think this paragraph should be clarified as indicated. On the other hand, NDC's argument that it was denied due process because the recordkeeping provision was not sought in the complaint, although it was proposed in complaint counsel's appeal brief to the Commission and answered by NDC, is without merit, FTC v. National Lead Co., 352 U.S. 419, 427–428, 77 S.Ct. 502, 1 L.Ed.2d. 438 (1957), as NDC's broader attacks even more plainly are.

[4] Paragraph 4 of the order directs NDC to cease and desist from

> Representing, directly or by implication, in any advertisement that an independent laboratory has tested any product or that any laboratory test substantiates or supports performance claims in said advertisement, unless each performance claim in said advertisement has been substantiated by a competent scientific test conducted by said laboratory or laboratories and unless such laboratory or laboratories have supplied respondents with a written report which describes, in detail, the entire test performed, including, but not limited [to], the product tested, instruments used, test procedures, data and results of such test.

NDC says this is inconsistent with the findings by the Administrative Law Judge and the Commission that the test reports in the company's possession adequately substantiated its claims concerning the effectiveness of VX-6. However, both the Administrative Law Judge and the Commission found that NDC's performance claims relating to the durational capacities of VX-6 were clearly unsubstantiated. The Commission further found that petitioners had expressly or impliedly represented VX-6 as laboratory-tested, without qualification, and that these representations had conveyed the misleading impression that the duration-of-effect claims were based on laboratory tests. Although petitioners contend that paragraph 4 should, at most, prohibit only unsubstantiated durational claims, the paragraph as written appears reasonably related to the misrepresentations found by the Commission. Accordingly, we find no flaw in paragraph 4, FTC v. Colgate-Palmolive Co., 380 U.S. 374, 389–390, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965).[2]

[5] We likewise see no merit in NDC's objections to paragraph 6, described above. NDC's point is that since it supplies the distributors with all the advertising materials, there is no need to send a copy of the order and obtain a receipt. But distributors may have a supply of old materials and may not confine themselves to the written word. Since the copies of the order can be delivered along with the revised advertising material, the only burden on NDC is of using certified mail so as to obtain a receipt. To impose this requirement is well within the broad power confided to the FTC in framing remedial orders.

The petition to review is denied except with respect to Paragraphs 1 and 2 of the order which are remanded to the Commission for reformulation in accordance with this opinion. No costs.

2. Petitioners contend that the initial complaint and proposed order did not adequately identify the issues to be litigated. However, the complaint sufficiently alleged that the performance claims had not been substantiated through adequate testing and that the product had not been "fully tested," and paragraph 4 of the final order is a narrower version of the two portions of the proposed order dealing with representations of testing.

Statutes Involved

CONSTITUTION OF THE UNITED STATES—AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

CONSTITUTION OF THE UNITED STATES—AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL TRADE COMMISSION ACT —15 U.S.C. 45

§45. Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices

(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as

applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in

the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Review of order; rehearing

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to

adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

Jurisdiction of court

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Precedence of proceedings; exemption from liability

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

Service of complaints, orders and other processes; return

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly

authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

Finality of order

(g) An order of the Commission to cease and desist shall become final——

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or

the petition for review dismissed by the court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

Same; order modified or set aside by Supreme Court

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; order modified or set aside by Court of Appeals

(i) If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the

order of the Commission shall become final when so corrected.

Same; rehearing upon order or remand

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

Definition of mandate

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

Penalty for violation of order; injunctions and other appropriate equitable relief

(l) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey

or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

Court appearances of Commission in its own name by its attorneys; notice and consultation with Attorney General

(m) Whenever in any civil proceeding involving this chapter the Commission is authorized or required to appear in a court of the United States, or to be represented therein by the Attorney General of the United States, the Commission may elect to appear in its own name by any of its attorneys designated by it for such purpose, after formally notifying and consulting with and giving the Attorney General 10 days to take the action proposed by the Commission.

As amended Nov. 16, 1973, Pub. L. 93-153, Title IV, §408(c), (d), 87 Stat. 591, 592.

No. 75-1640

In the Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL DYNAMICS CORPORATION, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

THOMAS E. KAUPER,
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Washington, D.C. 20580.

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OPINIONS BELOW

The court of appeals rendered no opinion. The opinion and order of the Federal Trade Commission (Pet. App. 3a-15a) are not yet officially reported.

JURISDICTION

The order of the court of appeals was entered on February 10, 1976 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on May 10, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Commission's order was arbitrary and capricious because it prohibited petitioners from advertising profits that dealers "can or will" make rather than only prohibiting advertisement of profits dealers "will" make.

2. Whether the order infringed petitioners' First Amendment rights.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, is reproduced at Pet. App. 20a-29a.

STATEMENT

Petitioners market a battery additive, VX-6, which is sold to dealers for resale. The Federal Trade Commission determined that petitioners' advertising of VX-6 was misleading and deceptive, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (C.A. App. 83a-113a).[1] The Commission found that petitioners used the unusually high earnings of a few distributors, or hypothetical potential earnings, to misrepresent the earnings which could normally be expected by distributors of VX-6 (C.A. App. 111a).

The court of appeals upheld the Commission's finding but ruled that the wording of portions of the Commission's order was unclear and unduly restrictive with respect to representations of actual earnings. The court remanded the case to the Commission for revision of the relevant paragraphs of the order, but otherwise affirmed and enforced the order (Pet. App. 16a-18a; 492 F. 2d 1333). This Court denied certiorari, 419 U.S. 993.

On remand, the Commission revised its order to permit petitioners to advertise actual earnings of VX-6 distributors, while requiring specific affirmative disclosures in connection with such advertising when it used unrepresentative examples (Pet. App. 12a-15a). The court of appeals summarily affirmed (Pet. App. 1a-2a).

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[1]"C.A. App." refers to petitioners' printed appendix in the court of appeals.

ARGUMENT

1. Petitioners contend that the Commission's revised order fails to comply with the court of appeals' limited remand and arbitrarily restricts their advertising (Pet. 6-10). Petitioners primarily contend that the Commission improperly barred them from representing that dealers in their products "can or will" make any stated amount of sales, profits or earnings from their resale. Petitioners point to certain nonlitigated cases in which the Commission had accepted consent orders that only prohibit representations that purchasers "will" make such earnings (Pet. 6-7).

The Commission is not required, however, to enter identical relief in all generally similar cases. Where a case is settled by a consent order, the Commission properly may accept less stringent relief than where, as here, the order is the product of a contested proceeding. Cf. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 413.

Petitioners also argue that the decision conflicts in principle with a prior decision of the same court of appeals (Pet. 8-9).[2] But any such intra-circuit conflict is for the court of appeals, not for this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902.

2. Petitioners also contend that the revised order constitutes an unconstitutional prior restraint of their freedom of speech because it prohibits them from making some

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[2]In that case, *Federated Nationwide Wholesalers Service* v. *Federal Trade Commission*, 398 F.2d 253 (C.A. 2), the court vacated an order prohibiting the petitioners there from representing themselves as "wholesalers" but allowing them to prove that they were "wholesalers" as a defense if challenged in any enforcement procedure by the Commission. That somewhat peculiar order is not analogous to the order here.

truthful representations of past or present earnings of dealers in their products (Pet. 7-9). The order essentially prohibits petitioners from advertising profits earned by dealers (as an inducement to new dealers) without revealing whether the figures used are typical and thus not misleading (See Pet. App. 12a-14a). In light of petitioners' prior misuse of such figures, this is an appropriate remedy. *Bigelow* v. *Virginia*, 421 U.S. 809, on which petitioners rely, does not impair the well-established authority of the government to restrain those who have engaged in false, misleading or fraudulent commercial advertising. See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, No. 74-895, decided May 24, 1976, slip op. 22-25.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

ROBERT J. LEWIS,
General Counsel,

GERALD P. NORTON,
Deputy General Counsel,

GERALD HARWOOD,
Assistant General Counsel,

JOHN T. FISCHBACH,
Attorney,
Federal Trade Commission.

JULY 1976.

DOJ-1976-07